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IN THE

SUPREME COURT OF THE UNITED STATES.

No.

CHARLOTTE WILD, Administratrix of the Estate of John Wild, Deceased,

Petitioner,

vs.

ATLANTIC REFINING COMPANY,
Defendant and Third Party Plaintiff,

vs.

CAMDEN PAINTING COMPANY,
Third Party Defendant.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Charlotte Wild, Administratrix of the Estate of John Wild, Deceased, by her attorneys, pray that a writ of certiorari issue to review the judgment of the United States

Circuit Court of Appeals for the Third Circuit entered in the above entitled case on March 17, 1952.

JURISDICTION.

The District Court for the Eastern District of Pennsylvania, upon motion granted judgment for the defendant, n. o. v. The Court of Appeals affirmed.

The judgment of the Court of Appeals for the Third Circuit was entered on March 17, 1952. On April 14, 1952, a timely petition for rehearing was filed. The petition was denied on May 15, 1952. The jurisdiction of this Court is invoked under 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. §1254.

QUESTIONS PRESENTED.

1. Did not the Court of Appeals err in holding that the rights of petitioner under the Seventh Amendment were not impaired by the action of the trial judge in granting judgment n. o. v.?

2. Did not the Court of Appeals err in holding that there are two different standards of right to trial by jury in Federal Court, namely, cases predicated on a federal question, and cases which are based on diversity of citizenship alone?

3. Did not the Court of Appeals err in following Pennsylvania procedural law and granting judgment n. o. v., where in the light of the evidence adduced federal law

requires the submission of the issue of negligence to the jury and did not such action deprive of the petitioner her right to trial by jury as guaranteed by the Seventh Amendment?

4. Did not the Court of Appeals err in holding that under Pennsylvania law the duty of an occupier of land to an invitee does not require him to have an expert examine a roof for safety when the occupier knows that the invitee must stand on the roof over an open air shaft eight stories high and when the occupier knows that although the roofing material is supposed to last the life of the building, other sheets on the same roof of the same age, make, and usage had already deteriorated so badly in parts as to require the insertion of substitute materials, especially where the original erection as well as all subsequent inspections and corrections had been made by the owner's own employees both prior and subsequent to the accident?

PRELIMINARY STATEMENT.

The decision of the Court of Appeals for the Third Circuit departs radically from precedent in two well settled aspects of the law. First, the Court refused to consider the grave constitutional problems of denial of right of trial by jury under the Seventh Amendment which arise when a Federal Court, after a jury verdict, review the facts and renders judgment n. o. v. pursuant to Rule 50(b). This is the same constitutional issue raised in *Johnson v. N. Y.*, 194 F. 2, 194 (C. A. 2d, 1952), etc. certiorari granted, now awaiting argument. Second, the Court without discussion ruled that in diversity cases the procedural question of whether there is sufficient evidence for the case to go to

the jury must be decided by a slavish adherence to state law as distinguished from the standard applied in cases dealing with federal law (Federal Employers' Liability Act, Jone Act). Petitioner further asserts that even the law of Pennsylvania does not require the issue of negligence under the circumstances of the case at bar to be decided by the Court. To the contrary, apposite Pennsylvania cases specifically confide this question to the jury.

STATEMENT OF THE CASE.

Petitioner, the widow of John Wild, brought suit as Administratrix against the Atlantic Refining company, to recover damages for the death of John Wild.

Wild, a citizen of New Jersey, was employed by the Camden Painting Company. At the time of the fatal accident, he was, in the course of his employment, engaged in painting the outside window sashes and exterior coping on the roof of No. 17 boiler house of the Atlantic Refining Company, a Pennsylvania corporation. The particular spot on which he was standing was over an open air shaft, eight stories high. There were no eye witnesses to the accident. Decedent was found lying on the floor of the boiler house. Admittedly, the portion of the roof on which he was standing had collapsed due to defective condition, causing the fatal fall. The jury returned a verdict for the plaintiff; and the trial judge, upon motion pursuant to Rule 50(b), of the Federal Rules of Civil Procedure set aside the verdict and ordered judgment for the defendant, n. o. v. The Court of Appeals affirmed and denied plaintiff's petition for rehearing.

Federal jurisdiction is based upon diversity of citizenship.

The Court of Appeals in its opinion succinctly stated the problem as follows:

> "* * * The question posed in the case is whether there was sufficient evidence of negligence on the part of the defendant to support the jury's verdict. In such a situation all disputes on controverted facts and reasonable inferences from the testimony must be taken in the plaintiff's favor. * * *"

The evidence adduced at the trial disclosed that the decedent was a business invitee of the defendant, properly upon the roof of the boiler house. The defendant knew that decedent would be required to walk upon the roof and upon that particular portion of the roof which gave way. The roof had been erected by the defendant itself in 1920. It was made of sheets of corrugated asbestos roofing, a material which, according to undisputed testimony, is supposed to get more durable with time and is supposed to last the life of the building. Prior to the accident, however, defendant's own employees had repaired some of the sheets on the roof by inserting corrugated metal sheets. They had acted as though they were expert in this material. There were other indications, such as "curling" of the asbestos sheets, of further deterioration of the roof at the point of the accident. It is conceded that neither decedent nor defendant recognized that "curling" was a symptom of deterioration. It is likewise undisputed that only an expert roofer would have recognized this sign of deterioration. The owner, however, admittedly knew that this roof which presumably could not deteriorate, was for some reason, known or unknown, deteriorating in fact. The issue, therefore, was, "Should the owner in view of these circumstances, have retained an expert to find out, 'why' ", especially in view of its own pretensions to "expertness"?

Pennsylvania has expressly adopted as its law of the liability of an occupier of land to a business invitee the rules

of the Restatement of Torts. Section 343 of the Restatement reads in part as follows:

> "A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he
>
> (a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and
>
> (b) has no reason to believe that they will discover the condition or realize the risk involved therein, and
>
> (c) invites or permits them to enter or remain upon the land without exercising reasonable care
>
> (i) to make the condition reasonably safe, or
>
> (ii) to give a warning adequate to enable them to avoid the harm without relinquishing any of the services which they are entitled to receive, if the possessor is a public utility."

The jury could first have found defendant's employees were negligent in not detecting the defect. The converse question was whether the defendant under all the circumstances was not in the alternative also negligent in inviting decedent onto the roof when his life was obviously in danger, without first having that part of the roof inspected by an expert. The jury found that in failing to do so, the owner was negligent. The Court ruled as a matter of law that failure to hire an expert under those circumstances was not negligence and reversed the jury's findings of fact. It ignored the first basis of negligence. The Court of Appeals, following what it conceived to be the Pennsylvania rule, affirmed on the ground specified by the District Judge and also ignored the first basis of negligence.

ARGUMENT.

1. *A judgment n. o. v. pursuant to Rule 50(b) violates petitioner's rights under the Seventh Amendment.*

The case at bar raises squarely the constitutionality of Rule 50(b). Certiorari on *the exact issue* has been granted in *Johnson v. N. Y., N. H. & H. R. Co.*, 194 F. 26, 194 (C. A. 2d, 1952), limited to this question. That case is *now* before the court.

The Seventh Amendment provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the rights of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

When a federal district judge pursuant to Rule 50(b) withholds ruling on a motion for a directed verdict until after the jury has rendered its verdict passing upon the facts, is not the subsequent action of the judge in reviewing the facts a violation of the Seventh Amendment? This very question has been presented to this court a number of times, but in no case has the issue been squarely met. The decisions in the various cases were based on other grounds. See *Berry v. U. S.*, 312 U. S. 450 (1941); *Myers v. Reading*, 331 U. S. 477 (1947); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29 (1944). *We ask the Court to accept this case, and hear it simultaneously with the identical Johnson case, supra.*

It is not disputed that federal courts have the power to direct a verdict, namely to take the case from the jury

when there is insufficient evidence to support a verdict. *Slocum v. New York Life Ins. Co.*, 228 U. S. 364 (1913); *Galloway v. U. S.*, 319 U. S. 372 (1943); *Gunning v. Cooley*, 281 U. S. 90 (1930). An entirely different question is presented when the case has been submitted to a jury which rendered its verdict determining the facts with finality, based upon all of the evidence and the trial judge *thereafter* reviews the same evidence and, reaching a contrary conclusion of *fact*, renders judgment n. o. v., reversing the jury. Precisely this conduct on the part of the trial judge was found to offend the Seventh Amendment in the Slocum case, supra. In *Baltimore & Carolina v. Redman*, 295 U. S. 654 (1935), the procedure was similar. At the close of the evidence the defendant moved both for dismissal and a directed verdict on the ground that the evidence presented was insufficient to support a verdict for the plaintiff. The trial court reserved decision and granted a judgment after the jury's verdict. The Court carefully distinguished the Slocum case, pointing out that in the Slocum case the verdict was taken pending the Court's ruling on motions. In the Redman Case the Court specifically reserved its decision. Neither party objected to this ruling of the Court. Therefore, it was permissible to imply the tacit consent of the parties. The right to trial by jury may, of course, be waived. *The import of the Redman decision appears to be that failure to object to the reservation of the trial courts ruling on the motion constituted a consensual waiver to the finality of the jury's verdict.*

Under Rule 50(b) the procedure of the Redman case is adopted but with the important distinction that the right of the trial court to reserve ruling on a motion for a directed verdict until after the jury's determination is now made absolute. *No consent of the parties, implicit or explicit, is now required or even possible.*[1]

---

[1] Note that the Advisory Committee in its Final Report of June, 1946, proposed to strike from Rule 50(b) this sentence: "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason not granted, the court is deemed to have

Petitioner respectfully urges that the constitutional rights of litigants cannot be so abrogated or diminished by rule of Court.

In *Myers v. Reading*, 331 U. S. 477 (1947); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29 (1944); and *Berry v. U. S.*, 312 U. S. 450 (1941), the same argument was presented. Upon analysis of the evidence there presented, this Court concluded that there was sufficient evidence to support the juries' verdicts. Therefore, the constitutional question was never reached. In *Brady v. Southern Ry. Co.*, 320 U. S. 476 (1943), where the evidence was insufficient to sustain the verdict, the Seventh Amendment was inapplicable because the case was tried in the state courts of North Carolina.

Galloway v. U. S., 319 U. S. 372 (1943) and *Halliday v. U. S.*, 315 U. S. 94 (1942), are two cases, factually very similar, arising under the War Risk Claims Act. The same constitutional question was raised in the Halliday case and again this Court found sufficient evidence to sustain the jury's verdict.

In the Galloway case where the Court concluded, three Justices dissenting, that there was insufficient evidence to go to the jury, a directed verdict was entered. The constitutional problem of judgment n. o. v. under Rule 50(b) was not presented. Moreover, Justice Rutledge drew a distinction between the applicability of the Seventh Amendment to claims against the United States and other cases.

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submitted the action to the jury subject to a later determination of the legal questions raised by the motion." This emendation was rejected. See Moore's Federal Practice, 2nd Edition, Vol. 5, P. 2307. Although the committee and Professor Moore were inclined to treat submission of factual issues to the jury as a polite fiction, Cone v. W. Virginia Pulp and Paper Co., 330 U. S. 212 (1947) clearly holds that an appellate court may not enter judgment on reversing the denial of a motion for directed verdict but must remand for a new trial. To permit the trial judge to enter judgment overruling the verdict of a jury equally disregards the function of the jury. **The fiction adopted in Rule 50(b) subject to a later determination, impliedly with the consent of the parties, is utterly fallacious since by the explicit language of the rule the parties can neither give nor withhold consent.**

No support for the constitutionality of Rule 50(b) may be drawn from the cited cases.

It is submitted that not only is the letter of the Seventh Amendment violated by permitting a trial judge to reweigh the evidence upon which the facts have already been decided by the jury, but also the spirit of common law jury trial is perverted. Issues of fact, under Rule 50(b), are not only reweighed by the trial judge, but also by the appellate courts which redetermine the jury's finding of facts. Thus the way is opened for the substitution of the nisi prius and appellate judges for the jury as ultimate arbiters of the facts. Under the established procedure before Rule 50(b) if the trial court erred in directing a verdict the cause could be remanded for final disposition by another jury in accordance with the express mandate of the Seventh Amendment. Rule 50(b) was devised in a laudable effort to avoid duplication of trials. Such practical considerations are irrelevant, *for expediency is not the measure of constitutionality.* Moreover, Rule 50(b) has not eliminated extended litigation, but on the contrary, has opened to appellate review, *factual* issues, which formerly were determined with finality by the jury. Twelve citizens who have arrived at a common judgment, a "sense of the meeting", having seen and heard the witnesses and being cognizant of the customs, and the practices of the community, should be and are the final tribunal to which the Constitution wisely confides the determination of disputed issues of fact. Neither the trial judge, a single individual, who has seen and examined the witnesses, not the several appellate judges who have not had that opportunity is an equivalent substitute for a jury. See the dissenting opinion of Mr. Justice Black in *Galloway v. United States,* supra. The Constitutional mandate requires the reverse.

Petitioner respectfully submits that Rule 50(b) violates her rights under the Seventh Amendment.

2. *Whether or not a verdict should be directed in a federal court in diversity cases is a procedural question governed by federal law.*

Federal Law in diversity cases governs the withdrawal of a case from the jury. *Gorham v. Mutual. Ben. Health & Accident Asso'n. of Omaha,* 114 F. 2d 97 (C. A. 5, 1947). Certiorari denied 312 U. S. 688. See Moore, Federal Practice, 2nd Edition, Vol. 5, Sec. 38.08. Congress has differentiated sharply between substantive law and procedural law. The Rules of Decision Act, 28 U. S. C. Sec. 1652, established the substantive law of the appropriate state as the law to be applied by federal courts in diversity cases. *Erie Railroad v. Tompkins,* 304 U. S. 64 (1938). The philosophy upon which the act is based and which this court has adopted in construing the statute is predicated upon the theory that there is no amorphous body of federal substantive common law. Except in matters governed by the Federal Constitution and by Acts of Congress the substantive law to be applied is that of the appropriate state. With respect to *procedural* matters, however, Congress has clearly determined that the federal courts shall not refer to the practice of the various states, but shall follow a uniform federal practice.[2] The Rules Enabling Act adopted as of June 19, 1934, 48 Stat. 1064, 28 U. S. C. 2072 provides as follows:

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions.

[2] Note that formerly under the Conformity Act, June 1, 1872, Ch. 255, 17 Stat. 197, the federal courts assimilated the procedure of the state courts. The Congress determined that a uniform practice should be established for the federal courts and that the practice of referring to the procedures of the various states should be abolished. To this end the Conformity Act was repealed and the Rules Enabling Act adopted.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution. * * *"

The United States Supreme Court, in adopting the Federal Rules of Civil Procedure prescribed the practice for the federal district courts in all cases *regardless* of the basis of jurisdiction.

The crepuscular line between substance and procedure is not always easy to define. To say that any rule which directly or indirectly affects the final result of the case begs the issue. In *Sibbach v. Wilson & Co.*, 312 U. S. 1 (1940), this court disposed of that argument refusing to read "substantive" as synonymous with "important" or "substantial". In the cited case, it was held that the practice established by the Federal Rules of Civil Procedure prevails in diversity cases, even though the state practice may be directly contrary. The cited case involved Rule 35 which permits physical examination of the litigant. Obviously a physical examination might directly influence the result of the case. It is interesting to note that the dissenting judges differed from the Court not as to the scope of the rules, but rather because this particular rule involved, it was alleged, an invasion of the right of privacy. The federal rules with respect to discovery and interrogations have a similar substantial effect upon litigation. There is no question however, but that in diversity cases these rules prevail irrespective of state practice. *Theurer v. Holland Furnace Co.*, 124 F. 2nd, 494 (C. A. 10, 1941). Cf. *Smith v. PTC*, 173 F. 26, 721 (C. A. 3, 1949), holding that procedural questions in diversity are no longer governed by state law.

The functions of judge and jury in a federal court are not governed by local law in diversity cases. The Supreme Court has rejected the contention that state statutes or even Constitutional provisions dealing with the submission of

issues to the jury prevail in federal courts. *Herron v. Southern Pacific Co.*, 283 U. S. 91 (1931). Chief Justice Hughes unequivocally ruled that "the function of the trial judge in a federal court is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court under either the Conformity Act or the 'Rules of Decision' Act * * *".

The quantum of proof required to submit a case to the jury in a federal court does not vary with the grounds upon which federal jurisdiction is based. The direction of a verdict is not a matter of local substantive law, but of federal practice and must be decided in accordance with federal law. *Gorham v. Mutual Ben. Health & Accident Ass'n of Omaha*, 114 F. 2nd 97 (C. A. 4, 1940), cert. den. 312 U. S. 699.

In *Lowry v. Seaboard R. Co.*, 171 F. 2nd 625 (C. A. 5, 1948), the Court of Appeals for the Fifth Circuit was faced with precisely this problem. The plaintiff sued under the Florida Wrongful Death Act for the homicide of his daughter. The case was removed to the federal court because of diversity of citizenship. The Court directed the jury to return a verdict of not guilty on the ground that there was no evidence of the railway's negligence. On appeal, the Court held that the factual question of whether or not the defendant had, under the circumstances, taken all the precautions necessary to absolve itself from negligence must be decided by the jury, irrespective of Florida law. The Court ruled:

> "* * * Whether a verdict should be directed in a federal court is a matter of federal law, having to do with the right of jury trial under the Constitution of the United States * * *". At p. 630.

The courts have refused to differentiate in the functions of the jury between cases arising under federal statute and

those in which jurisdiction is predicated upon diversity of citizenship. See *Pennsylvania R. R. v. Goldie,* 182 F. 2d 9 (C. A. 6, 1950).

Under the federal practice, negligence is a question of fact to be decided by the jury. Grand Trunk Ry. v. Ives, 144 U. S. 408 (1892). In the cited case federal jurisdiction was based on diversity of citizenship. The Supreme Court, in holding that the question of negligence in federal courts is a matter for the jury, stated:

> "* * * It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as a question of law for the court * * *". At p. 417.

See also *Jones v. E. Tenn. U. & G. R. Co.,* 128 U. S. 433 (1888), and *Washington & G. R. Co. v. McDade,* 135 U. S. 554 (1890). Federal jurisdiction in all of these cases was predicated upon diversity of citizenship.

More recent federal cases, are pellucid in holding that questions of negligence must be left to the jury, if any evidentiary basis exists, even though the court might itself reach a contrary conclusion upon the evidence presented. See *Wilkerson v. McCarthy,* 336 U. S. 53 (1949); *Bailey v. Central Vermont Rwy.,* 319 U. S. 350 (1943); *Tiller v. Atl. C. L. Rwy.,* 318 U. S. 54 (1943); *Lavender v. Kurn,* 327 U. S. 645 (1946). A federal court may not set aside the jury's verdict even though it would have drawn different inferences or conclusions or because a contrary result is more reasonable. *Tennant v. Peoria Rwy.,* 321 U. S. 29, 35 (1944).

In a recent case arising under the Texas Workmen's Compensation Act, the same rule as to the province of the jury was reiterated. The Court again stated that:

> "* * * An appellate federal court should not disturb the jury's finding of fact if on the trial there was any sufficient evidence to support the findings, even though the appellate judges may not believe the facts so found

to be true, since an appellate court has no constitutional right to express an opinion as to the truth or falsity of such act, the issue being entirely within the province of the jury * * *."

Liberty Mutual Ins. Co. v. Thompson, 171 F. 2d, 723 (C. A. 5, 1948). Note that this case is subsequent to the Rules of Decision Act.

Rule 50(b) of the Federal Rules of Civil Procedure was not intended to alter or to detract from the province of the jury in deciding questions of fact. In *Berry v. United States,* 312 U. S. 450 (1941), the Supreme Court considered the effect of Rule 50(b) on the role of the jury and found that "that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal for trying facts in courts of law." at page 453.

Rule 50(b) provides that the trial judge may defer ruling on defendant's motion for judgment until after all the evidence is presented. The Court must, however, either when the motion is made or at the conclusion of the case, confide to the jury the issue of negligence if there is any evidence or any inference to be taken from the evidence that might sustain a verdict. Recent federal cases have not deviated from the earlier cases cited above in respecting the role of the jury as the sole trier of the facts. *Sartor v. Arkansas Natural Gas Corp.,* 321 U. S. 620 (1944). In the cited case the court overruled summary judgment granted under Rule 56. The Court quoted with approbation the rule as to the minimum quantum of evidence required to take the case to the jury as stated in *Spring Co. v. Edgar,* 99 U. S. 645, 658:

"* * * If the Court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony."

The Court further stated that Rule 56 was not designed to cut off litigants from their right of trial by jury. See page 627. Similarly, Rule 50(b) was not designed to deprive litigants of their right to trial by jury as known in the federal courts. *Stevens v. Howard D. Johnson Co.*, 181 F. 2d 390 (C. A. 4, 1950).

The learned Court of Appeals for the Third Circuit has cited no case in which the quantum of proof necessary for a negligence case to be submitted to the jury in a federal court has been determined by state law rather than by federal practice. Diligent search by counsel has revealed no such cases. It is respectfully urged that the ruling of the Court below is contrary to all precedent. Moreover, it would establish a practice of reference to state law in procedural matters directly contrary to the express mandate of Congress in the Rules Enabling Act, *supra*. Such a practice would be most confusing and burdensome. It would require the Court and counsel to differentiate between cases in which jurisdiction is predicated upon diversity of citizenship and all other cases. In the former, practice would have to conform to the court's views as to the procedural requirements of the state, the substantive law of which was being supplied. In the latter, the Federal Rules of Civil Procedure would prevail. Federal courts are frequently hampered from doing justice in individual cases by construing the Rules of Decision Act to require them, where no state statute and no apposite state decisions are available to ascertain what it is presumed the state court would do under the circumstances. Such constructions of the act have been the subject of much adverse criticism. See Clark, State Law in the Federal Courts; The Brooding Omnipresence of *Erie v. Tompkins*, 55 Yale Law Journal, 267 (1946); see also 100 U. of Pa. Law Review, 1065 (1952).

To enlarge the scope of the Rules of Decision Act to make a federal judge seek to ascertain whether a state court would or would not submit an issue to the jury is not only unwar-

ranted but would, as in the case at bar, defeat the ends of justice.

The Court of Appeals for the Third Circuit in the case at bar has, without discussion, applied the Rules of Decision Act governing solely substantive matters to procedural matters in violation of the Rules Enabling Act and the Federal Rules of Civil Procedure. The learned Court has, moreover, attempted to apply the procedural law of Pennsylvania under circumstances in which that law, governing the right of a trial judge to direct a verdict under the circumstances of the case at bar, is most uncertain. It is respectfully urged that this decision is without precedent and contrary to the legislative intent of Congress.

3. *The Constitutional guarantee of trial by jury under the Seventh Amendment requires that in federal courts, the jury pass upon disputed issues of fact, irrespective of state law to the contrary.*

Liberty Mutual Ins. Co. v. Thompson, 171 F. 2d 723 (C. A. 5, 1948). Assuming arguendo[3], that Pennsylvania law would require the direction of a verdict in the case at bar and that federal courts are required to follow state procedural matters in this respect, nevertheless, the right of trial by jury as guaranteed by the Constitution is paramount. The supremacy of the federal government requires that state statute and practice be subordinate to the mandates of the Federal Constitution. For example, where the practice of Pennsylvania did not require that an accused be advised of his right to trial by jury, the Supreme Court of the United States nevertheless held that the Federal Constitution was violated when an accused was not so advised in a trial in the state courts of Pennsylvania. *Uveges v. Pennsylvania*, 335 U. S. 437 (1948). See also *Johnson v.*

[3] Petitioner contends that Pennsylvania law would require the submission of the case at bar to the jury. See point 4, infra.

Zerbst, 304 U. S. 458 (1938). Similarly, a systematic exclusion of one group of society from the state jury panels, although a recognized procedure of the state courts, violates the due process requirement of the Fourteenth Amendment. *Smith v. Texas*, 311 U. S. 128 (1940).

No state may by statute or decision, limit or diminish the jurisdiction of the federal courts. See *First National Bank of Chicago v. United Air Lines*, 72 S. Ct. 421 (1952); and *Hughes v. Fetter*, 341 U. S. 609 (1951). Compare *Woods v. Interstate Realty Co.*, 337 U. S. 535 (1949) and *Order of United Commercial Travelers v. Wolfe*, 331 U. S. 586 (1947), which preclude the federal courts in diversity cases from permitting claims which would not be recognized in the state courts. These cases clearly delineate the boundary between the substantive law of the state which the federal courts are required to follow and Federal Constitution guarantees which may not be abridged by state law. The full faith and credit clause of the Constitution must be recognized by the federal courts even where such recognition violates state statute.

Similarly, if the effect of state practice is in reality to deny litigants rights guaranteed by the Seventh Amendment, then the state law must be disregarded. This court declared unequivocally:

> "While litigants in federal courts cannot, by rules of procedure, be deprived of fundamental rights guaranteed by the Constitution and laws of the United States * * *."

Lyon v. Mutual Ben. Health & Accident Ass'n., 305 U. S. 484 (1939) at page 492.

This problem of the delicate relationship between the state and federal legal systems long antedated *Erie Railroad v. Tompkins, supra.* This Court has always held that federal rights may not be denied regardless of state statute or decision. In *Davis v. Wechsler*, 263 U. S. 22 (1923), litigants brought suit in a Missouri court for personal injuries suf-

fered while the defendant railroad was under federal control. Under Missouri practice, the court had a right to unite a plea to the jurisdiction and a defense to the merits. Pursuant to such practice the appearance of the defendant constituted a waiver of venue. This Court reversed the judgment of the state court, holding that local practice cannot invalidate federal rights. Mr. Justice Holmes trenchantly declared:

> "The assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. * * *" at p. 24.

To remove the crucial issue of negligence from the province of the jury under the guise of state law is in reality to deprive petitioner of her rights guaranteed by the Seventh Amendment. The presence or absence of negligence is an issue of fact, *Tiller v. Atlantic Coast Line*, 318 U. S. 54 (1943). Federal cases clearly confide solely to the jury the function of fact finding. *In determining the scope of the Seventh Amendment, the federal courts need not read the United States Constitution in the expurgated edition of the state courts.*

4. *The law of Pennsylvania as declared in decisions of that state's highest court place upon the jury the decision as to whether the possessor of land may be charged with notice of the dangerous condition which caused injury to an invitee.*

Vetter v. Great A. & P. Tea Co., 322 Pa. 449, 185 A. 613 (1936). In the Vetter case (note that this case was cited by the Court of Appeals as authority for its decision) a trash collector slipped on refuse on a dark stairway. The trash collector was a business invitee. The Court held that it was for the jury to decide whether the defendant had notice of

the condition of the stairway which caused the accident. If there was no notice, there could, under Pennsylvania law, be no liability. No evidence was introduced to show actual notice by those in charge of the store. The Court held, however, that under the circumstances, the jury must decide whether notice could be imputed to the defendant.

This case should be distinguished from *Bechtel v. Franklin Trust Co.*, 120 Pa. Superior 487, 183 A. 57 (1936), in which the defect which caused the injury could not have been discovered from an examination of the premises. In the Bechtel case, plaster fell from the ceiling injuring the plaintiff. The ceiling showed no evidence of any defect and none could have been discovered except by taking down the plaster and examining it. In this case defendant made a positive showing that inspections were made regularly.

In the case at bar, however, defendant did not show that it had inspected the roof for safety. Furthermore, the defect was clearly observable to any expert roofer. The case at bar is on all fours with *Thorpe v. Boudwin*, 228 Pa. 165, 77 A. 421 (1910). In the cited case, the plaintiff's decedent was an employee of a tenant who occupied the building as a slate mantle and imitation tile factory. The floor collapsed fatally injuring the decedent. There were no eye witnesses to the accident. Questions of negligence due to overloading, faulty construction and contributing to failure to maintain a safe place for a business invitee were raised. The Court held that it was proper to submit the case to the jury on mere opinion evidence as to the cause of the collapse. The court further stated, at page 172:

> "* * * It was clearly competent for appellant to show that repairs to the walls had not been properly made when required and that the owner had notice of the unsafe alterations he proposed to make and that these conditions remained to the time of the accident* * *."

In the case at bar, there was ample opinion evidence that the roof was defective and that the owner had notice of these

defects when he repaired the roof by inserting corrugated iron sheets and that these unsafe conditions remained to the time of the accident.

Prior defects or failures even in different areas require a possessor of land to employ an expert to check upon the possibility of similar hazards. Failure to obtain expert opinion under such circumstances constitutes negligence under Pennsylvania law. *McCarthy v. Ference*, 358 Pa. 485, 58 A. 2d, 49 (1948); *Fuller v. Pennsylvania R. R. Co.*, 169 Pa. Super. 523 (1951). The defendant here, had had repeated prior notice of sporadic collapses of the same roof in contiguous areas. It created a corresponding duty of care. The jury found that the prior collapses were such notice of the instant defect as to impose liability on the defendant for not having found the defect and not repairing it.

In *Newingham v. J. C. Blair Co.*, 232 Pa. 511, 81 A. 556 (1911) plaintiff was injured when a fire escape broke. The jury found that proper inspection would have revealed the defect. The Supreme Court in that case and in many cases since, adheres to the rule of the Restatement of Torts in Section 343, which reads:

> "A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he (a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and (b) has no reason to believe that they will discover the condition or realize the risk involved therein* * *."

The leading Pennsylvania case *Kulka v. Nemirovsky*, 314 Pa. 134, 139, 170 A. 2d 261 (1934), follows this section and approves of it in the following language:

> "Defendant owed to the plaintiff the affirmative duty of keeping his premises reasonably safe for business visitors, such as plaintiff, and of giving warning of any

failure to maintain them in that condition; Robb v. Niles-Bement-Pond Co., 269 Pa. 298, 112 A. 459; Markman v. Bell Stores Co., 285 Pa. 378, 132 A. 178; Newingham v. J. C. Blair Co., 232 Pa. 511, 81 A. 556; Pauckner v. Wakem, 231 Ill. 276; Starcher v. So. Penn Oil Co., 81 W. Va. 587, 602; Restatement, Torts (Tent. Draft No. 4) section 202 (see comment a), section 213. *Plaintiff was entitled to rely on defendant's performance of this duty.* Restatement, op. cit. supra, section 213 (see comment d); Yuhasz v. Pitt. Const. Co., 305 Pa. 166, 157 A. 461; Adams v. Fields, 308 Pa. 301, 305, 162 A. 177; Blondin v. Oclitic Quarry Co., 11 Ind. App. 395; Gobrecht v. Beckwith, 82 N. H. 415. Moreover, as plaintiff was employed by another and not by defendant, the doctrine of assumption of risk did not apply to him; Thrussel v. Handyside, L. R. 20 Q. B. Div. 359; DeLee v. Pardy Const. Co., 249 N. Y. 103; Zurich Ins. Co. v. Childs Co., 253 N. Y. 324.

"*Plaintiff*, entering the premises, not only for his employer but in the interest of the defendant, *was entitled to assume that defendant had performed his duty to persons so invited; he was not required, by anything that appears in this record, to make an independent survey of the place from which the punch and shear had to be removed, to see whether defendant had in fact performed his duty—the failure to investigate was, therefore, not contributory negligence as a matter of law.*" (Emphasis supplied.)

Finally, in Pennsylvania, the law is clear that one *is* obliged to hire an expert to make proper inspections where the owner has not such knowledge himself. Thus in *Hardy v. Philadelphia National League Ball Club*, 99 Pa. Super. Ct. 326 (1930), where the ball club had relied upon an inspection made by the Bureau of Building Inspection prior to the accident, the Court said:

"* * * The law has always required, and still requires, the property owner's fulfillment of the duty of periodical inspection and examinations of his property, either by himself, or, *where such work requires technical skill, by experts employed by him.*" (Emphasis supplied.)

No case has been cited by defendant or in the opinion of the Court, which overrules these cases. Under Pennsylvania law, it is respectfully urged, it was error for the trial court to grant judgment for the defendant, n. o. v.

CONCLUSION.

From the plains of Runneymede to a Philadelphia factory may seem to be a long journey in time and in space, but the synapse is clear. The right to trial by jury, long cherished as a right of free born Englishmen, is a bulwark of freedom in the United States. The Federal Courts stand as the protectors and implementers of basic American rights. The frontal attack on these cherished liberties is rarely successful. But they may be eroded and emasculated under the guise of procedure or in the name of efficiency and economy.[4] Rule 50(b) giving to the nisi prius federal judge and through him to the appellate courts the right to review the findings of a jury and to substitute therefor their own findings as to the facts seriously diminishes the right of all

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[4] Compare the following statement which Lord Erskine attributes to Lord Chesterfield: "Let us consider, my Lords, that arbitrary power has seldom or never been introduced, into a country at once. It must be introduced by slow degrees, as if it were step by step, lest the people should see it approach. The barriers and fences of a people's liberty must be plucked up one by one, and some plausible pretence must be found for removing or hoodwinking, one after another, those sentries who are posted by the Constitution of a free country, for warning people of their danger."
The Whole Proceedings on the Trial of an Information Against Thomas Paine, 2d/Ed. London, 1793, at pp. 65, 66.

Americans to trial by jury. The impact of this rule has already led this Court to grant certiorari in the Johnson case, supra.

The interrelation between the Federal Courts and the laws of the several states underlies all cases in which jurisdiction is based upon diversity of citizenship. It is respectfully submitted that the Federal Courts are not and should not be hamstrung by the procedural practice of the several states. Pursuant to statute the Supreme Court of the United States has established rules of procedure for the federal courts in all cases. To cite the innumerable federal cases holding that negligence is a question of fact which the jury must decide unless there is no evidence and no reasonable deductions upon which a verdict may be supported is to pile Ossa on Pelion. The Federal Rules should not be supplanted by requiring the Federal Courts to ascertain and follow state procedural practice without the clearest legislative intent. It is further submitted that to require slavish adherence to state practice when it results in the derogation of rights guaranteed by the United States Constitution is violative of the basic concepts upon which a federal system of government is and must, of necessity, be predicated. Therefore, it is urged that the decision of the United States Court of Appeals for the Third Circuit be reversed, lest it cause confusion and promote litigation resulting from the obscuration of issues and practice which are now clear, logical and pragmatically satisfactory. Lest, indeed, it create two separate standards of the right to jury trial in the *same* federal court—obviously an impossible and intolerable situation possibly violating, in addition, the equal privileges and immunities clause of the Constitution of the United States. Since the problem presented in the instant case is precisely that now before the Court in Johnson v. N. Y., supra, it is respectfully requested that the Court here grant certiorari, too; that both matters

may be heard at the same time, providing the Court with more complete briefing and argument in the issues.

Respectfully submitted,

RICHTER, LORD & FARAGE,
B. NATHANIEL RICHTER,
Attorneys for Petitioner.

LOIS G. FORER,
Of Counsel.